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Testimony
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Committee on Resources
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The San Joaquin River Restoration Settlement Act
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Mr. Chairman and members of the Subcommittee, my name is Thomas Birmingham, and I am General Manager/General Counsel of the Westlands Water District. I appreciate the opportunity to testify today on "*The San Joaquin River Restoration Settlement Act.*"

At the outset, I would like to express our appreciation for your decision to conduct this oversight hearing and take testimony from agencies that are not party to *Natural Resources Defense Council v. Rodgers*, the litigation that would be settled through enactment of the San Joaquin River Restoration Act. Resolution of this longstanding litigation would be historic, and the settlement would bring water supply certainty to a portion of the San Joaquin Valley that is of critical importance to the agricultural economy of the State of California. However, to avoid creating uncertainty and risk for other portions of the Valley, it is critical that the settlement be implemented in a manner that does not shift to other agencies unwarranted burdens associated with the San Joaquin River restoration program. I am confident that your decision to hear from "third parties" will facilitate the development of amendments to the San Joaquin River Restoration Act that will avoid third party impacts while not frustrating the agreement of the settling parties.

1. Westlands Water District Experience with Water Shortages

Westlands Water District (Westlands) is a public agency of the State of California, which serves irrigation water to portions of the westside of the San Joaquin Valley in Fresno and Kings counties. Westlands is comprised of more than 605,000 acres, and the demand for irrigation water is 1.4 million acre-feet per year. Historically, that demand has been satisfied through the use of groundwater, water made available to the District from the Central Valley Project under contracts with the United States for the delivery of more than 1.15 million acre-feet, and annual transfers of water from other agencies.

Westlands is one of the most fertile, productive and diversified farming regions in the nation. Rich soils, a good climate, and innovative farm management have helped make the area served by Westlands one of the most productive farming areas in the San Joaquin Valley and the nation. Farmers in Westlands produce over 60 different high-value, commercial crops that are sold both domestically and internationally in the fresh, canned, frozen and dry food markets. However, like every other region of the arid west, the ability of Westlands farmers to produce these crops and generate the associated economic activity depends on the availability of an adequate, reliable source of water.

Westlands' experience with the implementation of the Central Valley Project Improvement Act (CVPIA), Pub. Law 102-575, is illustrative of what can happen to an agricultural region like the area served by the Friant Division of the Central Valley Project when significant quantities of water are involuntarily reallocated from irrigation use to fish and wildlife use. Water deliveries to Westlands from the Project began in 1967, and up until 1991, those deliveries were highly reliable and adequate to meet the demand in Westlands for irrigation water. Indeed, from 1967 to 1991, Project water was the principal source of water for irrigation within Westlands, and the only reduction in

Project water supplies resulted from the extraordinary drought conditions in 1977, the driest year on record in California. However, enactment of CVPIA made Westlands' Project water supply both unreliable and inadequate. The CVPIA was implemented by the Department of the Interior in a manner dedicated more than 1,200,000 acre-feet of Project water for the restoration and enhancement of fish and wildlife. Much of this water was taken away from farms, ranches and business that had relied on it for decades. Contrary to the assumption at the time of CVPIA's enactment, that it would reduce water supplies by approximately 10% Project wide, virtually all of the water supply reductions resulting from implementation of CVPIA were imposed on south-of-Delta Central Valley Project agricultural water service contractors. The reliability of water supplies for south-of-Delta water service contractors went from approximately 92% in 1991 to approximately 50% in 2000, when the CalFED Record of Decision was adopted.

In response to chronic water supply shortages caused by CVPIA, Westlands farmers have had to rely more on the use of groundwater as a source of irrigation water. In 2004, farmers in Westlands pumped more than 210,000 acre-feet of groundwater, which is significantly more than the USGS estimate of the safe yield of the groundwater basin (135,000 acre-feet). To the extent which farmers have to rely on groundwater is contrary to sound principals of conjunctive use, which dictate that in wet or above normal years of precipitation, groundwater use should be reduced to allow the groundwater table to recover. In addition, Westlands has acquired and fallowed more than 89,000 acres of land to help balance the demand for water with the District's available supply. Westlands has also acquired all of the lands in Broadview Water District and the water service contracts of Widren Water District, Centinella Water District, Mercy Springs Water District, and Ora Loma Water District. Lands in these other districts that were previously irrigated with Project water have been retired from irrigated agricultural production. In the San Joaquin Valley land fallowing results in third party impacts, which disproportionately affect the poor and minorities.

It is easy for westside farmers, who have suffered the turmoil and increased costs resulting from unreliable, inadequate water supplies, to understand the Friant water users' keen interest in resolving a conflict that has the potential of taking more than a-half-a-million acre-feet from farmers for fishery restoration. Although Westlands has not prepared a detailed analysis of potential impacts, it is safe to conclude that a judicial decision adverse to the Friant water users would devastate the agricultural economy of the eastside of the San Joaquin Valley, and Westlands supports the Friant water users' efforts to minimize through the a settlement potential water supply losses resulting from a San Joaquin River restoration program.

Need to Avoid Third-Party Impacts

The Settlement Agreement among the NRDC, other environmental plaintiffs, the United States, and the Friant water users states that the parties neither intend nor believe that implementation of the Settlement Agreement will have a material adverse effect on any third parties. Given the nature of the claims that the settling parties seek to resolve through the Settlement Agreement any other intent would be unreasonable. However, in

their present form the Settlement Agreement and the San Joaquin River Restoration Settlement Act could be interpreted or implemented in ways that could have significant adverse effects on agencies that were not parties to the litigation or involved in development of the restoration program. For instance, without close coordination, the restoration program established by the Settlement Agreement could frustrate efforts undertaken by other agencies to restore or enhance the fall run Chinook salmon fishery on tributaries of the San Joaquin River. In addition, if as contemplated by the Settlement Agreement the spring run Chinook salmon are reintroduced into the San Joaquin River, the take prohibition of the Endangered Species Act could dramatically reduce the water supply or hydroelectric generating capability of agencies that were neither party to the litigation nor involved in the development of restoration program. To avoid these unintended consequences Westlands suggests that the San Joaquin River Restoration Settlement Act be amended to express an unambiguous congressional intent that third parties not suffer adverse effects.

I am confident that other witnesses will focus their testimony on potential effects that could be suffered by the agencies they represent. Therefore, my testimony will focus on potential impacts on south-of-Delta long-term contractors that currently receive water from the Delta Division of the Central Valley Project, including the San Luis Unit.

Use of Central Valley Project Water for Restoration of the Spring and Fall Run

The Settlement Agreement establishes a “Restoration Goal” of restoring and maintaining in good condition fish in the main stem of the San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally-reproducing and self-sustaining salmon fisheries. Flow criteria established by the Settlement Agreement limit for a period of years the quantity of water that can be released from Friant Dam for the restoration and maintenance of fish below the Dam, but there is no comparable limitation on the use of other Central Valley Project water or facilities to accomplish the Restoration Goal. Although the Settlement Agreement provides that the Secretary of the Interior shall comply with Endangered Species Act in connection with his operation of the Friant Division of the Central Valley Project, the Settlement Agreement limits the quantity of water that can be involuntarily taken from Friant Division long-term contractors to implement the Act for the protection of salmon, or other fish, below Friant Dam. There is no comparable protection for other Central Valley Project long-term contractors.

Stated succinctly, the Settlement Agreement and the San Joaquin River Restoration Settlement Act limit the obligation of the Secretary to operate the Friant Division for the protection of fish under the Endangered Species Act, but the Secretary’s underlying obligation to operate the Central Valley Project to avoid take and promote recovery of listed species that will be reintroduced to the main stem of the San Joaquin River between Friant Dam and the confluence with the Merced River is unaffected. For this reason it is conceivable that the Secretary could be required to use water from other Central Valley Project facilities to accomplish the “Restoration Goal” established by the Settlement Agreement. As an example, if it is determined that the flow provided by releases from

Friant Dam is insufficient to support out-migrating spring run salmon and the insufficient flow would cause jeopardy for the species, the Endangered Species Act and the San Joaquin River Restoration Settlement Act, when read together, would obligate the Secretary to look to other sources of Central Valley Project water to provide additional flow. It is conceivable that in order to provide such additional flow, the Secretary of Commerce though a biological opinion issued for the operation of the Central Valley Project could impose as a reasonable and prudent alternative the release of water from San Luis Reservoir into the Delta-Mendota Canal for subsequent release into the San Joaquin River.

In recent discussions with the settling parties, they have stated unequivocally that such a scenario was never envisioned and it not their intent to impose on the Secretary of the Interior an obligation to take water from other Central Valley Project long-term contractors in order to achieve the Settlement Agreement's Restoration Goal. Therefore, to avoid this potential, unintended effect Westlands suggests that the San Joaquin River Restoration Settlement Act be amended to provide that the only Central Valley Project water that the Secretary is authorized to use to achieve the Restoration Goal is water released pursuant to the Settlement Agreement from Friant Dam. Such an amendment would do no violence to the settling parties' expectations and would protect south-of-Delta Central Valley Project water service contractors, who have already lost more than 650,000 acre-feet to fish and wildlife uses, from suffering additional water supply shortages.

Another potential reduction in water supplies of agencies that receive water from the Delta export facilities of the Central Valley Project or the State Water Project could result from pumping limitations imposed to prevent take of the reintroduced spring run salmon. There are already in place numerous restrictions on pumping at the Tracy Pumping Plant and the Harvey O. Banks Pumping Plant imposed to protect or enhance other anadromous and pelagic fish species. However, if out-migrating spring run salmon reintroduced pursuant to the Settlement Agreement are in the vicinity of these pumps at times their operations are not restricted, it is likely that additional pumping restrictions will be imposed. As a consequence, the water supplies for agencies that receive water from the Delta export facilities would be reduced. To avoid this unintended effect, the San Joaquin River Restoration Settlement Act should be amended to direct the Secretary of Commerce to exercise his existing authority to designate as an experimental population pursuant to Article 10(j) of the Endangered Species Act the reintroduced spring run Chinook salmon. Such a designation would protect the Central Valley Project and the State Water Project from water supply losses that otherwise would occur to prevent the incidental take of the species.

Recirculation or Recapture of Water

Provisions of both the Settlement Agreement and the San Joaquin River Restoration Settlement Act direct the Secretary to develop and implement a plan or program of recirculation, recapture, reuse, exchange or transfer of water released for restoration flows, for the purpose of reducing or avoiding impacts to water deliveries to the Friant

long-term contractors. It has been reported in the press that Peter Vorster, Ph.D., a hydrologist for the environmental plaintiffs has calculated that approximately 100,000 acre-feet of water released from Friant Dam pursuant to the Settlement Agreement could be recaptured in the Delta for export back to the Friant Division. If these reports are accurate, Dr. Vorster's conclusion is unrealistic.

Presently, the capacity of the Tracy Pumping Plant and the permitted capacity of the Banks Pumping Plant are fully dedicated to meeting contractual commitments to agencies outside of the Friant Division. Indeed, because of existing restrictions imposed at these pumping plants to protect or enhance anadromous and pelagic fish, except in extremely wet hydrologic conditions, neither the Secretary nor the California Department of Water Resources can meet water supply commitments to their respective contractors. If a program to recapture or recirculate restoration flows released from Friant Dam were to displace existing uses of the Tracy Pumping Plant or the Banks Pumping Plant, the water supplies of other agencies would undoubtedly be reduced and significant conflict would ensue.

I am informed by representatives of the Friant water users that it is not their intent to displace existing uses of either the Tracy Pumping Plant or the Banks Pumping Plant. Instead, it is their expectation to use excess capacity at these facilities when it is available. To avoid any future conflict concerning this issue Westlands proposes that the San Joaquin River Restoration Settlement Act be amended to provide that the Secretary's duty to implement a recapture or recirculation program shall be subordinate to the Secretary's use of the Tracy Pumping Plant to make Project water, other than restoration flows released from Friant Dam, and water acquired through transfers available to existing south-of-Delta Central Valley Project contractors. Moreover, because the Agreement of November 24, 1986, Between the United States of America and the Department of Water Resources of the State of California for the coordinated operation of the Central Valley Project and the State Water Project, authorized by Pub. Law 909-546, provides, *inter alia*, for the coordinated operations of the Tracy the Banks Pumping Plant, the Secretary's duty to implement a recapture or recirculation program should be subordinate to his performance of that agreement and any agreement to resolve conflicts arising from the coordinated operations agreement.

Conclusion

Again, I want to express Westlands' support for the Friant water users' effort to minimize the water supply losses that could result from an adverse ruling in the judicial proceedings concerning the Secretary's obligation to release water from Friant Dam to restore and maintain in good condition fish that exist below the Dam. If the settling parties are sincere in their belief that implementation of the Settlement Agreement will not have a material adverse effect on any third parties, I am confident that we will be able to reach agreement on amendments to the San Joaquin River Restoration Settlement Act to ensure avoidance of such effects on south-of-Delta Central Project long-term contractors and other potentially affected agencies. I would welcome any questions from members of the Subcommittee.